No. 10-1149

In the Supreme Court of the United States

TERRENCE JOHNSON, JIM HARRIS, JOSHUA ROBERTS,

Petitioners,

v.

BILL HASLAM, Governor of the State of Tennessee; MARK GOINS, Coordinator of Elections; TRE HARGETT, Secretary of State of Tennessee; RICHARD HOLDEN, Administrator of Elections for Shelby County; KIM BUCKLEY, Administrator of Elections for Madison County; ALBERT E. TIECHE, Administrator of Elections for Davidson County, in their official capacities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

ROBERT E. COOPER, JR.
ATTORNEY GENERAL & REPORTER

JOSEPH F. WHALEN
ASSOCIATE SOLICITOR GENERAL
Counsel of Record
JANET M. KLEINFELTER
DEPUTY ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TN 37243
(615) 741-3499
Joe.Whalen@ag.tn.gov

Attorneys for Respondents Bill Haslam, Governor of the State of Tennessee, Mark Goins, Coordinator of Elections, and Tre Hargett, Secretary of State of Tennessee

April 20, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. Whether conditions placed on felon re-enfranchisement comport with equal protection requirements where, because felons do not have a fundamental right to vote, the State must show only a rational basis for the conditions and the conditions imposed by the State are rationally related to legitimate state interests.

2. Whether, because felons have been constitutionally stripped of the right to vote, conditioning their re-enfranchisement upon paying court-ordered victim's restitution and child support obligations implicates the Twenty-Fourth Amendment's prohibitions on conditioning the right to vote on payment of poll taxes or other taxes.

3. Whether the Sixth Circuit exceeded its judicial authority in affirming the District Court's decision that the enactment of the Tennessee Statutes did not violate the Ex Post Facto Clause of the Tennessee Constitution.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING REVIEW 5

I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND PRIOR DECISIONS OF OTHER LOWER COURTS IN HOLDING THAT CONDITIONS TO FELON RE-ENFRANCHISEMENT MUST ONLY BE RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST. 7

A. Felons Do Not Have a Fundamental Right to Vote, and Any Conditions On Felon Re-Enfranchisement Are Subject to the Rational Basis Standard. As a Result, Decisions of This Court and Other Circuit Courts Analyzing State-Imposed Conditions On Non-Felons' Fundamental Right to Vote Are Inapposite. 8

B. The Sixth Circuit Correctly Stated and Applied the Rational Basis Test, As

Tennessee Does Have a Legitimate Interest in Protecting the Ballot Box from Felons Who Have Yet to Complete the Court-Imposed Punishment and/or Continue to Violate Valid Court Orders. 13

II. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OF LOWER COURTS IN HOLDING THAT CONDITIONING FELON RE-ENFRANCHISEMENT UPON PAYING VICTIM'S RESTITUTION AND CHILD SUPPORT OBLIGATIONS DOES NOT VIOLATE THE TWENTY-FOURTH AMENDMENT. 15

III. THE SIXTH CIRCUIT'S HOLDING THAT ENACTMENT OF THE TENNESSEE STATUTES DID NOT VIOLATE THE EX POST FACTO CLAUSE OF THE TENNESSEE CONSTITUTION INVOLVES AN ISSUE OF STATE LAW NOT WARRANTING THIS COURT'S REVIEW. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Baker v. Cuomo,
58 F.3d 814 (2d Cir. 1995), *vacated in part on other grounds, sub nom. Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (*en banc*) 10

Bearden v. Georgia,
461 U.S. 660 (1983) 13

Doe v. Mich. Dep't of State Police,
490 F.3d 491 (6th Cir. 2007) 13

Dunn v. Blumstein,
405 U.S. 330 (1972) 12

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 13

FCC v. Beach Commc'ns, Inc.,
508 U.S. 307 (1993) 13

Griffin v. Illinois,
351 U.S. 12 (1956) 12

Harman v. Forssenius,
380 U.S. 528 (1965) 15, 16, 17

Harper v. Virginia State Bd. of Elections,
383 U.S. 663 (1966) 12

Harvey v. Brewer,
605 F.3d 1067 (9th Cir. 2010) 9, 10, 14, 17

Hayden v. Paterson,
594 F.3d 150 (2d Cir. 2010) 10

Hudson v. United States,
522 U.S. 93 (1997) 19

Johnson v. Bredesen,
579 F. Supp. 2d 1044 (M.D. Tenn. 2008) 1

Jones v. Helmes,
452 U.S. 412 (1981) 14

Kadrmas v. Dickinson Pub. Sch.,
487 U.S. 450 (1988) 8

Lubin v. Parish,
415 U.S. 709 (1974) 12

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 6

May v. Carlton,
245 S.W.3d 340 (Tenn. 2008) 19

Owens v. Barnes,
711 F.2d 25 (3d Cir. 1983) 11

Papasan v. Allain,
478 U.S. 464 (1977) 9

Richardson v. Ramirez,
418 U.S. 24 (1974) 9

Roberts v. LaVallee,
389 U.S. 40 (1967) 13

Romer v. Evans,
517 U.S. 620 (1996) 8

Shepherd v. Trevino,
575 F.2d 1110 (5th Cir. 1978) 11

Smith v. Doe,
538 U.S. 84 (2003) 19

United States v. Ward,
448 U.S. 242 (1980) 19

Vance v. Bradley,
440 U.S. 93 (1979) 13, 15

Wesley v. Collins,
791 F.2d 12355 (6th Cir. 1986) 9

Statutes

28 U.S.C. §1254 1
28 U.S.C. §1367 18
Tenn. Code Ann. § 36-5-101(e) 15
Tenn. Code Ann. § 40-29-202(a) (2006) 2
Tenn. Code Ann. § 40-29-202(b)-(c) (2006) 1

Rules

Fed. R. Civ. P. 12(c) 3, 5
Fed. R. Civ. P. 56(a) 3

Regulations

Tenn. Comp. R. & Regs. 1240-02-04-.01-.09 15

OPINIONS BELOW

The October 28, 2010, opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the district court judgment dismissing the amended complaint, is reported at 624 F.3d 742 (6th Cir. 2010). (Pet. App. 1a-88a). The order denying rehearing and rehearing en banc is also reported at 624 F.3d 742. (Pet. App. 89a-90a). The memorandum opinion of the district court dismissing the amended complaint is reported at 579 F. Supp. 2d 1044 (M.D. Tenn. 2008). (Pet. App. 91a-126a).

JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254.

STATEMENT OF THE CASE

The State of Tennessee disenfranchises convicted felons but provides a statutory procedure for regaining the franchise upon completion of their sentences and satisfaction of certain conditions. Tennessee's re-enfranchisement statute provides that a convicted felon may apply for a voter registration card and seek to regain the right of suffrage upon:

(1) Receiving a pardon, except where the pardon contains special conditions pertaining to the right of suffrage;

(2) The discharge from custody by reason of service or expiration of the maximum sentence imposed by the court for the infamous crime; or

> (3) Being granted a certificate of final discharge from supervision by the board of probation and parole pursuant to § 40-28-105, or any equivalent discharge by another state, the federal government, or county correction authority.

Tenn. Code Ann. § 40-29-202(a) (2006). This statute carves out two exceptions to re-enfranchisement eligibility:

> (b) . . . a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person has paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence[, and]
>
> (c) . . . a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person is current in all child support obligations.

Tenn. Code Ann. § 40-29-202(b) – (c).

Petitioner Johnson was convicted of wire fraud in 1999, and the court sentenced him to a term of imprisonment and ordered him to pay $40,000 in restitution. Petitioner Johnson has completed his prison term but remains unable to satisfy the restitution order. Additionally, petitioner Johnson owes a significant amount in court-ordered child support payments. Petitioners Harris and Roberts both have multiple felony convictions. While they have completed their prison terms for these convictions, they both owed child support obligations

($2,500 and $7,000) at the time they filed suit. Petitioner Harris has since paid his overdue child support and thus faces no impediment to applying for re-enfranchisement; however, he continues to press a claim for nominal damages on account of any past constitutional harm. (Pet. App. 4a).

On February 25, 2008, petitioners filed suit in the Middle District of Tennessee, challenging the constitutionality of the re-enfranchisement statute's restitution and child support provisions, asserting that these provisions violate the Fourteenth Amendment's Equal Protection Clause, the Twenty-Fourth Amendment, the Privileges and Immunities Clauses of the federal and state constitutions, and the Ex Post Facto Clauses of the federal and state constitutions. On August 1, 2008, the state defendants filed a motion for judgment on the pleadings as to all of the petitioners' claims pursuant to Fed. R. Civ. P. 12(c). The petitioners filed a cross-motion under Fed. R. Civ. P. 12(c) or, in the alternative, a motion for partial summary judgment pursuant to Fed. R. Civ. P. 56(a). A hearing was held on the parties' respective motions on September 3, 2008. On September 28, 2008, the district court issued a memorandum opinion finding in favor of the state defendants on all of the constitutional challenges and dismissed petitioners' amended complaint. (Pet. App. 91a-126a).

A divided, three-judge panel of the Sixth Circuit affirmed the judgment. (Pet. App. 1a-88a). The majority first recognized that a state may constitutionally disenfranchise convicted felons and that the right of felons to vote is not fundamental. Accordingly, it found that because Tennessee's re-enfranchisement law neither implicates a fundamental

right nor targets a suspect class, the district court properly applied rational basis review to the petitioners' equal protection challenge. (Pet. App. 7a-8a). The court then found that "the state's interests of encouraging payment of child support and compliance with court orders, and requiring felons to complete their entire sentences, including paying victim restitution, supply a rational basis for the challenged statutory provisions sufficient to pass constitutional muster." (Pet. App. 9a).

With respect to petitioners' Twenty-Fourth Amendment claims, the majority held that, "[a]s convicted felons constitutionally stripped of their voting rights by virtue of their convictions, Plaintiffs possess no right to vote and, consequently, have no cognizable Twenty-Fourth Amendment claim." (Pet. App. 18a). The court further held that Tennessee's re-enfranchisement law does not condition the right to vote on payment of restitution or child support, but instead conditions the restoration of a felon's right to vote on such payment, which is not addressed by the Twenty-Fourth Amendment. (Pet. App. 18a). Finally, the court held that even if the Twenty-Fourth Amendment applied, restitution and child support represent legal financial obligations incurred by the petitioners themselves and, therefore, fail to qualify as the sort of taxes the Amendment seeks to prohibit. (Pet. App. 19a).

The court also rejected petitioner's ex post facto claim under the Tennessee Constitution,[1] finding no

---

[1] Although petitioners had challenged the statute under the Ex Post Facto Clauses of both the United States and Tennessee

evidence that the legislature enacted the challenged provisions with punitive intentions or that the statute's purpose or effect had negated the legislature's non-punitive intentions. The court further found that the restitution and child-support-payment provisions bore a rational connection to legitimate non-punitive interests of the state and are not excessive with regard to those purposes. (Pet. App. 22a-23a).

On November 10, 2010, petitioners filed a petition for rehearing en banc with the Sixth Court, which was denied on December 17, 2010. (Pet. App. 89a-90a). Petitioners now seek this Court's review.

REASONS FOR DENYING REVIEW

Petitioners present three questions on which they seek review by this Court. The first is whether Tennessee's felon re-enfranchisement statutes may condition the restoration of a felon's voting rights upon: (a) the payment of victim's restitution and child support obligations regardless of the felon's ability to satisfy those debts[2]; and (b) the payment of child

---

Constitutions, they "appeal[ed] only the rejection of their Tennessee Constitutional Claim." (Pet. App. 21a).

[2] The opinion of the District Court that disposed of this matter was the result of Respondents' motion pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. As a result, the District Court was limited to consideration of the Amended Complaint. *See* (Pet. App. 96a) (stating, "the only pleading the Court can consider [in ruling on Respondents' motion] is the Amended Complaint."). Nowhere in the Amended Complaint do the petitioners assert that any one of them is indigent or unable to pay their court-ordered restitution or child support obligations.

support when such payment is unrelated to the person's underlying conviction. As every United States court of appeals considering a similar question has held, because felons, properly stripped of their right to vote, do not have a fundamental right to vote, the State must show only a rational basis for placing conditions on felon re-enfranchisement. Here, there is a rational basis for the conditions of requiring felons to have paid the court-ordered victim's restitution and their court-ordered child support obligations. One such basis is protecting the ballot box from past law-breaking felons who continue to refuse to abide by the laws of the State, and there are numerous others.

Petitioners' second question is whether the state statutes in question violate the Twenty-Fourth Amendment's prohibition on conditioning a citizen's right to vote on payment of poll taxes or other taxes. First, as every United States court of appeals considering similar questions has concluded, felons who have been stripped of their right to vote do not have a right to vote to abridge, thus removing the question from the scope of the Twenty-Fourth Amendment. Second, even if the Twenty-Fourth Amendment were implicated, victim's restitution and child support obligations are not "taxes."

Petitioners' third question presented for review by this Court is whether the Court of Appeals for the Sixth Circuit exceeded its judicial authority in ruling

---

As a result, petitioners do not have a cognizable injury upon which to base their standing to challenge the statutes effect on those who cannot afford the required payments. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

that enactment of Tennessee's felon voter re-enfranchisement statutes did not violate the Ex Post Facto Clause of the Tennessee Constitution. First, to the extent petitioners are actually challenging the merits of the ruling of the court below, the issue is one purely of state law, not justifying intervention by this Court. Second, to the extent that the question presented is actually whether the court below exceeded its authority, it certainly did not, as the federal court had supplemental jurisdiction to entertain purely state law claims that were part of a matter that presented primarily federal questions. Third, petitioners do not challenge the legal standard the court below applied in its Ex Post Facto analysis, as it was the correct standard, again making it the sort of question not typically entertained by this Court. Fourth, and finally, the court below was correct in its application of the facts to the legal standard.

I. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND PRIOR DECISIONS OF OTHER LOWER COURTS IN HOLDING THAT CONDITIONS TO FELON RE-ENFRANCHISEMENT MUST ONLY BE RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

Petitioners' claims throughout the litigation have been falsely premised upon the idea that convicted felons, constitutionally stripped of their right to vote, have a fundamental right to re-enfranchisement, and that any conditions on re-enfranchisement must meet the strict requirements of the cases striking down preconditions to voting for non-felons. In furtherance of that false premise, petitioners mistakenly cite to

United States Supreme Court and lower court opinions striking down numerous state-enacted conditions on the right to vote for non-felons. Those opinions, however, were all based upon the Court's application of a strict scrutiny analysis, as voting is a fundamental right for non-felon citizens that are of majority age. As a result, petitioners' claim that the Sixth Circuit's decision here conflicts with prior decisions of this Court and of lowers courts is incorrect.

A. Felons Do Not Have a Fundamental Right to Vote, and Any Conditions On Felon Re-Enfranchisement Are Subject to the Rational Basis Standard. As a Result, Decisions of This Court and Other Circuit Courts Analyzing State-Imposed Conditions On Non-Felons' Fundamental Right to Vote Are Inapposite.

The Equal Protection Clause bars states from making distinctions that burden a fundamental right or target a suspect class without demonstrating a compelling or substantial state interest. *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457 (1988). In instances where a state makes distinctions that do not implicate a fundamental right or burden a suspect class, the state must only demonstrate a rational basis for the distinction. *See Romer v. Evans*, 517 U.S. 620, 631 (1996).

Here, the Tennessee statutes in question target felons and places conditions on their re-enfranchisement process by requiring payment of restitution and child support obligations.

As the Sixth Circuit correctly held, the Tennessee statute disenfranchising felons is constitutional. (Pet. App. 7a) (citing *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974)). Furthermore, having been constitutionally stripped of that right, felons no longer have a fundamental interest in voting or re-enfranchisement to assert. (*Id.* at 7a-8a) (citing *Wesley v. Collins*, 791 F.2d 12355, 1261 (6th Cir. 1986).). Finally, as the Sixth Circuit correctly pointed out, and as this Court has held, wealth classifications do not discriminate against a suspect class. (Pet. App. 8a) (citing *Papasan v. Allain*, 478 U.S. 464, 470-71 (1977)). As a result, as the Sixth Circuit concluded, any statute targeting felons that burdens their right to re-enfranchisement, even one that burdens the indigent more so than the wealthy, will survive constitutional scrutiny if the state has a rational basis for such conditions. (Pet. App. 7a-8a).

Other courts of appeals considering similar questions have arrived at the very same result. In *Harvey v. Brewer*, the Court of Appeals for the Ninth Circuit examined an Arizona statute that led to the following system: (1) individuals convicted of a felony are automatically disenfranchised; (2) felons who complete a term of probation or receive an absolute discharge from imprisonment and pay any fines or restitution imposed are automatically re-enfranchised. 605 F.3d 1067, 1070 (9th Cir. 2010). In finding the statute constitutional, the Ninth Circuit stated: "What plaintiffs are really complaining about is the denial of the statutory benefit of re-enfranchisement that Arizona confers upon certain felons. This is not a fundamental right; it is a mere benefit that (as plaintiffs admit) Arizona can choose to withhold entirely. Therefore, we do not apply strict scrutiny[.]"

Id. at 1079. The Ninth Circuit further reasoned: "Just as States might reasonably conclude that perpetrators of serious crimes should not take part in electing government officials, so too might it rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights."[3] *Id.* at 1079.

In *Hayden v. Paterson*, the Court of Appeals for the Second Circuit examined a New York statute that bars all felons from voting upon conviction but allows voting by felons who have completed their maximum sentence of imprisonment including parole, received suspended or commuted sentences, or have been sentenced to probation or conditional or unconditional discharge. 594 F.3d 150, 160 (2d Cir. 2010). In ruling on dissimilar claims than this matter (related to disparate impact of the law and discriminatory intent in its passage), the Second Circuit stated that, "although the right to vote is generally considered fundamental, in the absence of any allegation that a challenged classification was intended to discriminate on the basis of race or other suspect criteria, statutes that deny felons the right to vote are not subject to strict judicial scrutiny." *Id.* at 170 (quoting *Baker v. Cuomo*, 58 F.3d 814, 820 (2d Cir. 1995), *vacated in part on other grounds, sub nom. Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (*en banc*)).

---

[3] The Ninth Circuit did go on to state that it was not passing on the question of whether requiring felons "who are truly unable to pay their criminal fines due to indigency" would pass the rational basis test. *Id.* at 1080. The reason the court did not pass on that question is, just like the circumstances in this case, the plaintiffs in that case had not alleged inability to pay. *Id.*

In *Shepherd v. Trevino*, the Court of Appeals for the Fifth Circuit examined Texas statutes that led to the following system: (1) individuals convicted of a felony in any court (state or federal) are automatically disenfranchised; (2) individuals convicted of a felony in Texas state courts and placed on probation may have their conviction set aside and be re-enfranchised by the court by which they were convicted, or may be re-enfranchised by gubernatorial pardon; and (3) an individual convicted of a felony in federal court may only be re-enfranchised after presidential pardon. 575 F.2d 1110, 1112 (5th Cir. 1978). When determining what level of scrutiny to apply to this scenario, in which felons were treated differently based upon the court of their conviction, the Fifth Circuit held: "[W]e conclude that selective disenfranchisement or reenfranchisement of convicted felons must pass the standard level of scrutiny applied to state laws allegedly violating the equal protection clause. Such laws must bear a rational relationship to the achieving of a legitimate state interest." *Id.* at 1114-15.

In *Owens v. Barnes*, the Court of Appeals for the Third Circuit examined a Pennsylvania statute that disenfranchised incarcerated felons but not unincarcerated felons. 711 F.2d 25, 26 (3d Cir. 1983). The Third Circuit held that because felons did not have a fundamental right to vote, "the standard of equal protection scrutiny to be applied when the state makes classifications related to disenfranchisement of felons is the traditional rational basis standard." *Id.* at 27.

Each of the courts of appeal that have considered what level of scrutiny to apply to felon re-enfranchisement laws and disenfranchisement laws

has held that the rational basis standard should apply, as felons do not have a right to vote. As a result, the Sixth Circuit's decision here comports with the rulings of its sister circuits and the rulings of this Court that led to those decisions.

Accordingly, petitioners' reliance on *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (striking down a Virginia poll tax applicable to non-felons), *Lubin v. Parish*, 415 U.S. 709 (1974) (striking down a Florida statute requiring payment of a fee by minority parties for ballot access), and *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down durational residence laws for non-felon voters), is misplaced;[4] the Sixth Circuit's decision here is not in

---

[4] Petitioners confuse several issues related to the jurisprudence on voting rights. Petitioners attempt to conflate the cases striking down wealth requirements for non-felons seeking to exercise the right to vote with the matter here – felons seeking re-enfranchisement.

In the cases striking down wealth classifications for non-felons, this Court has relied upon the fact that the right to vote is a fundamental right. The Court then goes on to strike down wealth requirements as inadequate to overcome the strict scrutiny analysis. See *Harper*, 383 U.S. 663. The strict scrutiny analysis was not invoked due to the wealth classification but, rather, due to the fundamental right to vote.

Here, felons have no fundamental right to vote. As a result, each of the strict scrutiny cases petitioners cite is irrelevant in this action. This distinction is discussed in detail by the Sixth Circuit in its discussion of the misapplication of the law by the dissenting judge. (Pet. App. 9a-17a).

Petitioners' numerous arguments related to the need for an "indigency exception" are similarly misplaced. In each of the cases petitioners cite, a fundamental right was at issue (generally the right to personal liberty) and thus an indigency exception was required. *See Griffin v. Illinois*, 351 U.S. 12 (1956) (finding

conflict with any of those decisions.

B. The Sixth Circuit Correctly Stated and Applied the Rational Basis Test, As Tennessee Does Have a Legitimate Interest in Protecting the Ballot Box from Felons Who Have Yet to Complete the Court-Imposed Punishment and/or Continue to Violate Valid Court Orders.

As the Sixth Circuit stated, "to survive rational basis scrutiny, the statute need only be 'rationally related to legitimate government interests,' and 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification[.]'" (Pet. App. 8a) (quoting *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 501 (6th Cir. 2007); and *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). Furthermore, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (*Id.*) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Finally, the Sixth Circuit, quoting this Court's decision in *Vance v. Bradley*, 440 U.S. 93, 97 (1979), stated: "[W]e will not

---

unconstitutional Illinois' administering of a law relating to writs of error in criminal cases in such a way as to deny adequate appellate review to the poor while granting review to others); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (holding that denying access to the "instruments needed to vindicate legal rights" on the basis of financial inability was unconstitutional); *Bearden v. Georgia*, 461 U.S. 660 (1983) (holding that state may not revoke indigent defendant's probation for failure to pay a fine for inability to pay).

strike down a statute on equal protection grounds 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'" (Pet. App. 8a-9a).

Petitioners do not challenge the Sixth Circuit's statement of the rational basis standard, leaving only the application of that standard. The Sixth Circuit found that Tennessee has a legitimate interest in "encouraging payment of child support and compliance with court orders, and requiring felons to complete their entire sentences, including paying victim restitution[.]" (Pet. App. 9a). In *Jones v. Helms*, this Court held that "[t]here can be no question about the legitimacy of the purpose to cause parents to support their children." 452 U.S. 412, 423 (1981). In *Harvey v. Brewer*, the Court of Appeals for the Ninth Circuit, examining the same issue as here, held that "[j]ust as States might reasonably conclude that perpetrators of serious crimes should not take part in electing government officials, so too might it rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights." 605 F.3d at 1079.

Petitioners assert that because child support obligations are not related to the underlying felony conviction, requiring those payments for re-enfranchisement cannot be rationally related to a legitimate state interest. In making this argument, petitioners ignore the legitimate state interest advanced by the Respondents – to protect the ballot box from past law-breaking felons who continue to

flout the law and violate valid court orders. Child support obligations are legal obligations reduced to court orders, just like restitution. By failing to pay child support obligations, felons are continuing the very same type of behavior that led to their disenfranchisement – breaking the laws of the State of Tennessee. In addition, child support obligations are directly related to the income of the obligor and can be changed if the obligor's income changes. *See* Tenn. Code Ann. § 36-5-101(e) and Tenn. Comp. R. & Regs. 1240-02-04-.01-.09. Furthermore, as the Sixth Circuit concluded, "statutory re-enfranchisement conditions need only further a legitimate government interest – not a legitimate government interest specifically tied to a state's authority for the initial disenfranchisement." (Pet. App. 17a) (citing *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

II. THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND LOWERS COURTS IN HOLDING THAT CONDITIONING FELON RE-ENFRANCHISEMENT UPON PAYING VICTIM'S RESTITUTION AND CHILD SUPPORT OBLIGATIONS DOES NOT VIOLATE THE TWENTY-FOURTH AMENDMENT.

Petitioners' assert that the Sixth Circuit's decision here conflicts with this Court's holding in *Harman v. Forssenius*, 380 U.S. 528 (1965). In *Harman*, this Court struck down a Virginia statute that required non-felon voters in federal elections to pay a poll tax or file a certificate of residence prior to voting. 380 U.S.

at 538. In striking the statute down, this Court reasoned:

> It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. Constitutional rights would be of little value if they could be indirectly denied or manipulated out of existence. Significantly, the Twenty-fourth Amendment does not merely insure that the franchise shall not be "denied" by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be denied or abridged for that reason. Thus, like the Fifteenth Amendment, the Twenty-fourth nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed.

Id. at 540-41 (internal citations and quotations omitted). As a result, this Court stated, "in order to demonstrate the invalidity [of a statute], it need only be shown that it imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* at 541.

Here, as the Sixth Circuit reasoned, the re-enfranchisement law at issue does not deny or abridge any rights, much less the right to vote. (Pet. App. 18a). The statutes at issue concern only the restoration of the right to vote. (*Id.*). As felons, constitutionally stripped of their right to vote, petitioners have no underlying right that they are attempting to exercise absent the payment of a tax. Thus, the Twenty-Fourth Amendment is not

implicated by the re-enfranchisement statutes; there is thus no conflict with *Harman*.

The Ninth Circuit ruled much the same way in *Harvey v. Brewer*. The court held:

> Plaintiffs' right to vote was not abridged because they failed to pay a poll tax; it was abridged because they were convicted of felonies. Having lost their right to vote, they now have no cognizable Twenty-Fourth Amendment claim until their voting rights are restored. That restoration of their voting rights requires them to pay all debts owed under their criminal sentences does not transform their criminal fines into poll taxes.

Harvey, 605 F.3d at 1080.

Furthermore, as the Sixth Circuit concluded, even if felon re-enfranchisement statutes did implicate the Twenty-Fourth Amendment, child support and victim's restitution are not taxes. Both are obligations incurred by the felons for actions unrelated to any taxing authority and unrelated to any tax statute. (Pet. App. 19a).

III. THE SIXTH CIRCUIT'S HOLDING THAT ENACTMENT OF THE TENNESSEE STATUTES DID NOT VIOLATE THE EX POST FACTO CLAUSE OF THE TENNESSEE CONSTITUTION INVOLVES AN ISSUE OF STATE LAW NOT WARRANTING THIS COURT'S REVIEW.

Petitioners assert that the Sixth Circuit exceeded its authority by ruling that the enactment of the statutes in question did not violate the Ex Post Facto Clause of the Tennessee Constitution. This issue is one purely of state law, not justifying intervention by this Court. In addition, petitioners do not challenge the legal standard the court below applied in its Ex Post Facto analysis, as it was the correct standard, again making it the sort of question not typically entertained by this Court.

Second, on the question whether the court below exceeded its authority, it certainly did not, as the federal court had supplemental jurisdiction to entertain purely state law claims that were part of a matter that presented primarily federal questions. 28 U.S.C. § 1367.

Regardless, the court below was correct in its application of the Ex Post Facto Clause of the Tennessee Constitution. As the Sixth Circuit stated, the Ex Post Facto analysis is a two step process: (1) the court must first determine whether the statute constitutes a civil or regulatory measure or is a punitive one; and (2) even if the statute was not intended to be punitive, a court should determine whether the statute is so punitive in purpose or effect as to negate that intention. (Pet. App. 21a) (citing

Smith v. Doe, 538 U.S. 84, 92 (2003); *Hudson v. United States*, 522 U.S. 93, 99 (1997); and *United States v. Ward*, 448 U.S. 242 248-49 (1980)). If the statute is intended to be punitive or is so punitive in purpose or effect as to negate the intention, then it is violative of the Ex Post Facto Clause. (*Id.*).

Here, the Sixth Circuit concluded, when it enacted the statutes in question, the Tennessee legislature did not intend it to be punitive. (Pet. App. 22a). Petitioners take issue with this finding, citing *May v. Carlton*, 245 S.W.3d 340, 349 (Tenn. 2008). In *May*, the Tennessee Supreme Court stated in dicta that statutes disenfranchising felons were punitive. *Id.* In that case, the Tennessee Supreme Court was faced with a situation in which a disenfranchisement law retroactively disenfranchised felons who had not been disenfranchised when convicted. *Id.* at 348. *May*, however, was concerned with retroactive disenfranchisement. Here, the statutes in question do not retroactively disenfranchise, they merely govern re-enfranchisement. So, even if felon disenfranchisement in Tennessee were punitive, that would be irrelevant to whether re-enfranchisement laws are. There is no evidence that the intent of the legislature in enacting the re-enfranchisement statutes was punitive or that the purpose or effect of those statutes is so punitive as to render the legislature's intent irrelevant.

In addition, the felon re-enfranchisement statutes do not add to any of petitioners' punishments for their felonies. Prior to the passage of the statutes in question, petitioners were disenfranchised; subsequent to their passage, petitioners remained disenfranchised The road to re-enfranchisement is not a part of their

punishment but, rather, a regulatory law for voter registration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter

JOSEPH F. WHALEN*
Associate Solicitor General

JANET M. KLEINFELTER
Deputy Attorney General
425 5th Avenue North
Nashville, Tennessee 37243
(615) 741-3499
Joe.Whalen@ag.tn.gov

*Counsel of Record

Attorneys for Respondents Bill Haslam, Governor of the State of Tennessee, Mark Goins, Coordinator of Elections, and Tre Hargett, Secretary of State of Tennessee